85-1847

No.

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

VITTORIO MINEO and FRANK CARLOMAGNO,
on behalf of themselves and all others similarly situated,
*Petitioners,*

*-vs-*

THE PORT AUTHORITY OF
NEW YORK AND NEW JERSEY,
*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## PETITION FOR A WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

## QUESTIONS PRESENTED FOR REVIEW

1. Can The Third Circuit rely upon National League of Cities v. Usery and determine that the Fair Labor Standards Act does not apply to Respondent when this Court specifically refuted National League of Cities while the cause was pending before The Circuit?

2. Where Congress, pursuant to Article I, Section 10, consented to a bi-state agreement creating a bi-state agency and reserved the right to alter, amend or repeal its consent, does such reservation constitute retention of a supervisory power?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

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NO.

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VITTORIO MINEO and FRANK CARLOMAGNO, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, Vittorio Mineo and Frank Carlomagno, individually and on behalf of all others similarly situated, pray that a Writ of Certiorari issue to review the Judgment

of the United States Court of Appeals for the Third Circuit which reversed the District Court's denial of Summary Judgment on behalf of the Respondent.

## STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The Petitioners, Mineo and Carlomagno, seek a Writ of Certiorari to review the Circuit Court's Judgment (A 60 )* rendered in accordance with an Opinion of the Third Circuit (A 1 ) on December 27, 1985, Judge Becker dissenting; a Petition for Rehearing In Banc was denied on February 6, 1986 (A 49 ), Judge Gibbons dissenting. The Judgment reversed the District Court's denial of Motion by Respondent for Summary Judgment based upon application of the

*A refers to the Appendix to this Petition annexed.

case of National League of Cities v. Usery, 426 U.S. 833 (1976) to the Fair Labor Standards Act, 29 U.S.C., Sections 201-219.

The Supreme Court has jurisdiction to review the Judgment below by Writ of Certiorari pursuant to 28 U.S.C., Section 1254(1). See, Forsyth v. Hammond, 166 U.S. 506, 511-13 (1897).

## PERTINENT STATUTES, REGULATIONS AND CONSTITUTIONAL PROVISIONS

The following Statutes set forth in the Appendix are pertinent:

The Fair Labor Standards Act, 29 U.S.C., Section 203(a), (b), (c), (d), (e)(1), (e)(2)(C), (x); Section 207(a)(1), (k); Fair Labor Standards Amendments of 1985, Public Law 99-150, 99th Congress, 99 Stat 787, Section 1;

Section 2(a), (c); Section 6; Section 7; 67th Congress, 1st Session, 42 Stat. 174, August 23, 1921.

The following constitutional provisions set forth in the appendix are pertinent:

Article I, Section 8, Clause 3; Article I, Section 10, Clause 3; Tenth Amendment.

## STATEMENT OF THE CASE

Petitioners are or were employees of the Port Authority of New York and New Jersey, a bi-state agency. They brought suit for overtime wages claiming the protection of the Fair Labor Standards Act.

The District Court denied Respondent's Motion for Summary

Judgment. Respondent had relied upon National League of Cities v. Usery, supra, for the proposition that the Tenth Amendment to the Constitution precluded application of the Fair Labor Standards Act to states or state agencies. The District Court, however, ruled that Respondent was engaged in mass transit and therefore came within an exception to the Tenth Amendment rationale which exception is outlined in United Transportation Union v. Long Island Railroad Co., 455 U.S. 678 (1982), and Kramer v. New Castle Area Transit Authority, 677 F.2d 308 (3rd Cir. 1982).

While Respondent's Appeal was pending in The Third Circuit, this Court overruled National League of Cities v. Usery, supra, in Garcia

v. San Antonio Metropolitan Transit Authority, ___ U.S. ___ 105 S. Ct. 1005 (1985) ruling that Congress had the power under the Commerce Clause to apply the wage and hour requirement of the Fair Labor Standards Act to states and state agencies thereby determining that the judicially devised preclusion of the operation of Fair Labor Standards Act based upon the Tenth Amendment was constitutionally unsound and the Statute at all times remained in effect on its terms.

The Third Circuit determined that Garcia should not apply retroactively and reversed the denial of the Summary Judgment thereby granting a Summary Judgment to Respondent. The ruling of The Third Circuit was a three to one decision, Judge Becker dissenting. The

Petition for Rehearing In Banc was filed and denied despite the dissenting opinion of Judge Gibbons.

Petitioners herein seek review of The Third Circuit Court's reversal of the District Court and granting of Summary Judgment in favor of the Respondent made in reliance upon National League of Cities v. Usery and its progeny, specifically Hodell v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264 (1981).

## REASONS WHY THE WRIT SHOULD BE GRANTED

1. This case is one of first impression regarding the retroactive application of the determination in Garcia v. San Antonio. As this Court recognized, its determination therein,

erasing the previously announced judicial exception to the specific language of Congress, affected the wage structure of all state and local government employees. The scope and extent of the retroactive effect of such reversal clearly is of national significance.

2. This case presents the opportunity to the Court to determine, for the first time, the extent, if any, of Congress' control over the activities of bi-state agencies, the formation of which agencies are in the first instance consented to by Congress in accordance with the requirements of Article I, Section 10, of the Constitution.

## ARGUMENT

### POINT I

### THE DECISION OF THE THIRD CIRCUIT CLEARLY CONTRADICTS THE RULING OF THIS COURT IN GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY.

During the pendency of the within matter in The Third Circuit, this Court decided Garcia v. San Antonio Metropolitan Transit Authority. The Court rejected the Tenth Amendment rationale previously stated in National League of Cities v. Usery for finding an exemption from the requirements of the Fair Labor Standards Act wage and hour provisions for states and state agencies.

Despite the determination by this Court in Garcia, The Third Circuit rejected the general historical rule stated by Chief Justice Marshall in the

early case of The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) that

> "It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be consitutional, and of that no doubt in the present case has been expressed, I know of no court which can contest its obligation,"

and chose to apply the rejected rationale of National League of Cities and its progeny to the facts at bar. In so doing, The Third Circuit looked to the general retroactivity rules that have been set forth by this Court in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). The three factors to be reviewed in accordance with Chevron in

short are (1) whether there is a new principle of law overruling clear past precedent, (2) whether retrospective operation will further or retard its operation, and (3) the equitable nature of the results.

The majority opinion of The Third Circuit ignores the entire thrust of this Court's determination in Garcia by finding that Garcia did in fact overturn clear past precedent (A 11). Such determination belies the very essence of this Court's reasoning in overturning National League of Cities, which reasoning was based upon the recognition that the case law following National League of Cities provided ...inconsistent results .

The second part of the Chevron test was likewise misapplied by basing

the analysis wholly on the effect of the determination on future compliance with the newly stated acceptance of the controlling application of the act of Congress. Such analysis fails to take cognizance of what Judge Becker has termed

> ...the unseemly spectacle of the court's deciding this case under a pre-existing analytical framework that the Supreme Court has found to be unsound in principle and unworkable in practice. (A 32).

The third prong of the Chevron test regards the inequities, if any, resulting from the application of the newly stated rule of law. No such inequities arise since application of Garcia leads only to a limited money damage liability to the Port Authority, which potential liability was foreshadowed by the inconsistent

rulings under National League of Cities. In this regard, the Court is reminded of its own expressed sentiments regarding the right of a public entitity to the funds allocated to it as set forth in Bradley v. Richmond School Board, 416 U.S. 696, 720 (1974):

> These funds were essentially held in trust for the public, and at all times the board was subject to such conditions or instructions of the use of the funds as the public wished to make through its duly elected representatives.

The holding of Garcia now recognizes that the allocation of the Port Authority's public funds is subject to the powers properly executed by Congress in passing the Fair Labor Standards Act wage and hour regulations.

In short, The Third Circuit used the Chevron analysis to allow the application of the rejected National League of Cities rationale to reverse the District Court's decision. To have allowed an affirmance of the District Court, had it ruled in Respondent's favor, by use of the National League of Cities analysis would have been error. To now take the matter one step further and allow a reversal of the District Court based on such analysis is in the words of Judge Gibbons ...a striking example of judicial lawlessness. (A 53).

## POINT II

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY AS A BI-STATE AGENCY COMING INTO EXISTENCE BY REASON OF CONSENT OF CONGRESS PURSUANT TO ARTICLE I, SECTION 10, CLAUSE 3, OF THE UNITED STATES CONSTITUTION IS SUBJECT TO APPROPRIATE CONGRESSIONAL SUPERVISION.

The Port Authority of New York and New Jersey was brought into being by reason of enactments of the Legislatures of the States of New York and New Jersey. Article I, Section 10, Clause 3, of the United States Constitution requires the states to obtain the consent of Congress. Consent of Congress was obtained by the promulgation of Chapter 77, 66th Congress, 1st Session, 42 Stat. 174, August 23, 1921. The Congressional Resolution consenting to the formation of the bi-state agency stated in its

final sentence ...that the right to alter, amend, or repeal this resolution is hereby expressly reserved. (A 65 ).

This Court has consistently recognized that the Commerce Clause reserves to Congress the power to regulate commerce between two or more states. Mondou v. New York, New Haven, & Hartford Railroad Co., 223 U.S. 1 (1912). This understanding is in conformance with the ruling by Chief Justice Marshall in the classic case of Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). Therein, Chief Justice Marshall recognized that

> ...when a state proceeds to regulate commerce with foreign nations, or among the several states, it is exercising the very power that is granted to congress, and is deemed the very thing

which congress is authorized to do.

It is for this reason that this Court has recognized that the power of Congress to regulate commerce supersedes bi-state compacts. See, Pennsylvania v. The Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 435 (1856), and South Carolina v. Georgia, 93 U.S. 4 (1876). The rationale behind the founding fathers' requirement for consent of Congress to the formation of bi-state compacts as explained at length in Virginia v. Tennesee, 148 U.S. 503 (1893), was to prevent the inappropriate increase of political power by states acting together thereby encroaching upon or interfering with

...the just supremacy of the United States.

When viewed in light of the Garcia

holding recognizing Congress' authority under the Commerce Clause to limit purely state actions, it must reasonably follow that Congress at all times, even under the National League of Cities analysis, retained authority under the Commerce Clause to promulgate statutes controlling Article I bi-state agencies. Having retained such authority, the control by Congress of bi-state wage and hour policy through the Fair Labor Standards Act should have been recognized, even prior to Garcia. The Third Circuit's holding implies a dilution of congressional influence over interstate commerce in contradiction to the requirements of the Commerce Clause and should therefore be reversed.

## SUPPLEMENTAL ARGUMENT

Subsequent to argument before the Circuit and in response to Garcia, Congress enacted Public Law 99-100, 99th Congress, 99 Stat. 787, November 18, 1985, Fair Labor Standards Amendments of 1985. The pertinent sections are set forth in the Appendix (A 63-64).

The issues that are raised by this enactment were not, nor could they have been, briefed or discussed below. They do not appear to have been considered by the Circuit. The Act purports to have some retroactive effect on rights accrued prior to its enactment. It is respectfully urged that any such purported effect is inappropriate as the rights of these Petitioners accrued and became vested under the Fair Labor

Standards Act prior to the enactment of the Amendments, prior to the effective date of the enactment as set forth in Section 6 (A 64 ) and prior to the date of the administrative policy of January 1, 1985 relied upon in the Statute to determine what employees are to be affected by the purported exclusion from liability. (Section 2(c), A 64 ).

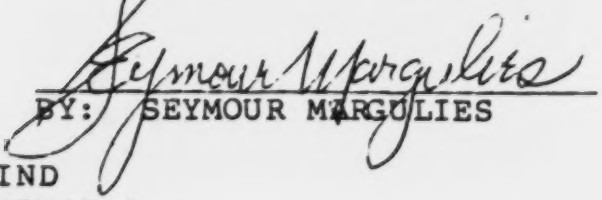
While it is respectfully urged that the issues raised by the Amendments are collateral to, and not controlling the rights of Petitioners, they are presented to the Court in order that the record be complete.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should be granted.

Respectfully submitted,

MARGULIES, MARGULIES & WIND
A Professional Corporation



BY: SEYMOUR MARGULIES

JACK JAY WIND
SEYMOUR MARGULIES
On the Petition

May 2, 1986

# APPENDIX

OPINION, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DECEMBER 27, 1985

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 83-5588

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VITTORIO MINEO, on behalf of himself
and all others similarly situated

v.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,
*Appellant*

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ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY
(D. C. Civil No. 80-03307)

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Argued May 16, 1985

Before ADAMS, BECKER and VAN DUSEN,
*Circuit Judges*

(Opinion filed December 27, 1985)

---

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## OPINION OF THE COURT

VAN DUSEN, *Senior Circuit Judge.*

This case, before the court on the district court's certification pursuant to 28 U.S.C. § 1292(b) (1982), presents the question whether appellees (hereinafter "Detectives"), who are police detectives employed by appellant, The Port Authority of New York and New Jersey (hereinafter "Port Authority"), are covered by the wage and hour provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1982) (hereinafter "FLSA"). In *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), which was decided after this court granted the Port Authority's petition for leave to appeal, the Supreme Court overruled its earlier decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and held that all state and municipal employees are covered by FLSA. For the reasons set forth in this opinion, we hold that *Garcia* should not be accorded retroactive application on the facts presented by this case and therefore that the Detectives do not fall within the coverage of FLSA. We will reverse the district court's denial of the Port Authority's motion to dismiss and will remand the case to the district court accordingly, with directions to dismiss this civil action.

I.

The Detectives are persons employed by the Port Authority as police detectives assigned to the Authority's Investigating Unit. They are authorized by the laws of New York and New Jersey to act as police officers, N.Y. Crim. Proc. L. § 1.20, subdivision 34(k) (McKinney 1981); N.J. Stat. Ann. § 32:2-25 (West 1963), and have the same powers as police directly employed by the two states. *See State v. Cohen*, 73 N.J. 331, 337,

375 A.2d 259, 264 (1977).[1] The Port Authority is a municipal instrumentality of New York and New Jersey created by a compact between these two states with the consent of Congress (hereinafter "Compact"). *See* 1921 N.Y. Laws Ch. 154; 1921 N.J. Laws Ch. 151, pp. 412-22; S.J. Res. 88, 42 Stat. 174 (1921).[2]

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1. According to the Port Authority's job specification 2601, it is the duty of the Detectives to perform confidential investigations "for the purpose of maintaining internal security at Port Authority facilities and preventing unlawful conduct." Job specification 2601 identifies the major duties of the Detectives to include: establishing factual evidence of conduct in violation of federal, state, and municipal laws, as well as Port Authority regulations; maintaining surveillance to prevent criminal activity at Port Authority facilities; investigating complaints against fellow members of the Port Authority police; conducting character investigations of Port Authority employees; and gathering evidence concerning vehicular accidents and aircraft emergencies involving Port Authority facilities (App. at 33a-34a).

2. The Port Authority is authorized and directed to plan, develop, and operate facilities of commerce that promote the economy of the Port District, which comprises an area of approximately 1,500 square miles in both states, centering about New York harbor. Specifically, the Port Authority is authorized to purchase, construct, lease, and operate any terminal or transportation facility and, as an incident thereto, to own or lease real or personal property and to borrow money secured by such property. *See* N.Y. Unconsol. Laws § 6407 (McKinney 1979); N.J. Stat. Ann. § 32:1-7 (West 1963). Examples of some of the transportation facilities operated by the Port Authority or one of its subsidiaries include: the Goethals, Bayonne, and George Washington Bridges; the Holland and Lincoln Tunnels; the Newark, La Guardia, and JFK International Airports; the Hoboken, Elizabeth, and Red Hook Marine Terminals; the World Trade Center; the Bathgate Industrial Park; and the Port Authority Trans-Hudson (PATH) commuter railroad. *See* The Port Authority of New York and New Jersey 1981 Annual Report 1-4 (1982). *See generally* Frankfurter & Landis, *Compact Clause of the Constitution -- A Study in Interstate Adjustments*, 34 Yale L.J. 685, 697-98, 746-47 (1925) (discussion of history of Port Authority).

This case had its origins in a collective bargaining dispute between the Detectives and the Port Authority over the latter's alleged refusal to pay the Detectives one and one-half times their regular hourly rate for hours worked in excess of forty hours a week. On October 10, 1980, in the midst of contract negotiations, the Detectives filed a complaint in the district court alleging that the refusal to pay this overtime rate violated Port Authority regulations. They later amended the complaint to allege that the Port Authority's refusal to pay overtime constituted a violation of FLSA.[3]

On December 2, 1980, the Detectives and the Port Authority signed a collective bargaining agreement that took retroactive effect as of July 9, 1978. This agreement provided that the Detectives would be paid time and one-half for hours worked on a regular day off or vacation day, but not if they simply worked more than a certain number of hours in a given week.[4] Under the agreement, the Detectives were paid 25% more an hour than regular police officers employed by the Port Authority. During the course of the contract negotiations between the two parties, the Port Authority had contended that this 25% premium wage

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3. FLSA provides that no employer shall employ any of its employees for a workweek longer than forty hours unless such employees receive compensation of at least one and one-half times the regular hourly rate for those hours worked in excess of forty hours. 29 U.S.C. § 207(a)(1). FLSA defines "employer" to include a public agency. 29 U.S.C. § 203(d). A "public agency" is defined to include "any agency of . . . a State, or a political subdivision of a State; or any interstate governmental agency." 29 U.S.C. § 203(x).

4. On April 3, 1984, the Port Authority and the Port Authority Detectives Endowment Association executed a new collective bargaining agreement which took effect retroactively as of July 3, 1983. Under the terms of this new agreement, the Detectives are paid time and one-half for overtime if they work more than a prescribed number of hours per week.

was being paid to the Detectives because they were often required to work overtime for which they received no increased hourly wage. The Detectives asserted, however, that they were entitled to the 25% premium because they performed duties in addition to those performed by regular Port Authority police officers and that the 25% premium therefore did not represent payment in lieu of time and one-half for overtime. The contract settlement thus did not end the overtime dispute, and the agreement contained no provision for the termination of the present lawsuit.[5]

Following a period of limited discovery, the Port Authority moved to dismiss the complaint, contending that the Supreme Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), exempted state employees such as the Detectives from FLSA because they performed a "traditional governmental function." The Detectives responded by moving for partial summary judgment. The district court held a hearing on both motions. On September 29, 1982, the district court filed an opinion and order denying the Port Authority's motion to dismiss. The court based its ruling on this court's earlier decision in *Kramer v. New Castle Area Transit Authority*, 677 F.2d 308 (3d Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983), which held that a mass transit authority was not an integral operation in an area of a state's "traditional governmental functions" and, therefore, that its bus drivers were not exempted from coverage under FLSA.

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5. The Detectives subsequently moved to proceed under the class action procedures of Fed. R. Civ. P. 23. The district court granted their motion with respect to the claim that the Port Authority violated its own regulations, but ordered them to pursue their FLSA claim under the permissive joinder provisions of that statute, 29 U.S.C. § 216(b). In accordance with these provisons, twenty-five police detectives became plaintiffs by opting to join in the FLSA action against the Port Authority.

*Id.* at 310. Reasoning that the Port Authority is engaged in the business of mass transit, the district court concluded that its employees, including the Detectives, are not exempt from FLSA coverage under *National League of Cities*.[6]

Because the case revolved around a potentially dispositive legal question, *viz.*, whether the Detectives are covered by FLSA, the Port Authority requested that the district court amend its September 29 order to certify the question for interlocutory appeal under 28 U.S.C. § 1292(b) (1982). The court agreed, and on May 23, 1983, it amended its September 29 order accordingly. Shortly thereafter this court granted the Port Authority's petition for leave to file an interlocutory appeal pursuant to Fed. R. App. P. 5(a).[7]

Prior to the date on which the case was to be heard in this court, the Supreme Court heard argument in consolidated appeals of *Garcia v. San Antonio Metropolitan Transit Authority*, No. 82-1913, and *Donovan v. San Antonio Metropolitan Transit*

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6. On November 15, 1982, the district court amended its September 29 order to deny Detectives' motion for partial summary judgment. The court concluded that there existed a material issue of fact as to whether the Detectives had actually worked overtime as defined by FLSA.

7. The May 23, 1983, district court order included the following language:

> "In the opinion of the Court, this Order involves a controlling question of law, whether the provisions of the Fair Labor Standards Act relating to wage and hour are applicable to the class of employees consisting of police detectives represented by the plaintiffs, and that an immediate appeal from the order will materially advance the ultimate termination of the litigation since a determination would finally resolve the legal issue relating to the applicability of the statute prior to the need for a lengthy proceeding establishing the damages, if any, due each member of the class should the statute be found to have been violated."

*Authority*, No. 82-1951, which presented the question whether the minimum-wage and overtime provisions of FLSA may be constitutionally applied to employees of publicly owned and operated mass transit systems. Because of the similarity between the question presented to the Supreme Court and the one presented here, we decided to hold this case under advisement pending the Court's decision. On February 20, 1985, the Supreme Court decided the *Garcia* and *Donovan* cases by overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976), and holding that no state employees should be exempted from coverage under FLSA. *See Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005, 1020 (1985). We then requested the parties to submit supplemental briefs addressing the question whether *Garcia* controlled this case. The parties disagreed as to the propriety of applying *Garcia* retroactively to serve as the governing law in this suit. This is the principal question we must now decide.

II.

Before determining whether to apply *Garcia* retroactively so as to govern this case, we will review the state of the law prior to *Garcia* to explain how and why *Garcia* changed such law.

In 1974, Congress amended FLSA to subject almost all persons employed by the states and their political subdivisions to its wage and hour provisions. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, 59. The National League of Cities and the National Governors' Conference challenged the amendments, contending that they unconstitutionally infringed upon states' sovereignty. The Supreme Court agreed that the determination of state employees' wages is an attribute of state sovereignty, *National League of Cities v. Usery*, 426 U.S. at 845, and held

that Congress may not use the Commerce power to impose upon the states its choices regarding essential decisions in areas of traditional governmental functions. *Id.* at 855. The Court thus declared FLSA unconstitutional to the extent that it purported to apply to state employees performing such functions. *Id.* at 852. The *National League of Cities* principle was clarified in a later decision, *Hodel v. Virginia Surface Mining & Recl. Assoc.*, 452 U.S. 264 (1981), which set out a three-part test for determining when congressional regulation of state conduct exceeded its Commerce Clause power:

> "First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'"

*Id.* at 287-88 (citations omitted).

The question presented to the Court in *Garcia* concerned an application of the third part of the *Hodel* test. The Court was asked to determine whether applying FLSA to employees of the San Antonio Metropolitan Transit Authority would constitute an impairment of San Antonio's ability to operate in an area of traditional governmental functions. *Garcia*, 105 S.Ct. at 1007. Although the Court in *National League of Cities* had identified certain types of state operations, such as police protection and fire prevention, as "traditional governmental functions," 426 U.S. at 851, the Court left to the lower courts the task of determining whether other state operations were traditional.

In *Garcia*, rather than deciding whether a state's mass transit operations are traditional and thus exempt from FLSA, the Court overruled *National League of Cities*. *Garcia*, 105 S.Ct. at 1021. Writing for the majority, Justice Blackmun stated that, contrary to the Court's determination in *National League of Cities*, nothing in FLSA is destructive of state sovereignty or violative of the Constitution. *Id.* at 1020. Because the states participate in the federal system, he wrote, they can sufficiently protect themselves from federal laws that unduly infringe upon their sovereignty. *Id.*

We now turn to an analysis whether the law of *Garcia* or that of *National League of Cities* should be applied to the Detectives' claim.

III.

It is a time-honored principle that courts will apply the law in effect at the time they decide a case. *See United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 102 (1801).[8] As a result, a recent decision is generally applied even to a dispute that arose prior to the court's holding. This approach reinforces the rubric advanced by Blackstone "that judges do not make but merely 'discover' law." *Marino v. Bowers*, 657 F.2d 1363, 1365 (3d Cir. 1981) (in banc) (citing *Linkletter v. Walker*, 381 U.S. 618, 622-29 (1965)). However, at times application of this retroactivity precept produces inequitable results, penalizing parties who ordered their affairs in reasonable reliance on a rule of law that was later invalidated. Such inequity is undesirable, not only

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8. This court has cited *The Schooner Peggy* recently in the following cases: *Perez v. Dana Corp., Parish Frame Div.*, 718 F.2d 581, 584 (3d Cir. 1983); *DiSabatino v. National R.R. Passenger Corp.*, 724 F.2d 394, 396 (3d Cir. 1984); *Williams v. Tri-County Growers, Inc.*, 747 F.2d 121, 124 (3d Cir. 1984); *Black United Fund of N.J., Inc. v. Kean*, 763 F.2d 156, 160 (3d Cir. 1985).

because of the harm to the party involved, but also because it discourages adherence to contemporary laws. Consequently, it has been held that courts in certain circumstances appropriately may determine not to apply a decision retroactively.

The Supreme Court, in its decision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), adopted the following three-part analysis for determining the retroactive effect of new law in civil cases:

> "In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants have relied, *see e.g., Hanover Shoe v. United Shoe Machinery Corp.*, [392 U.S. 481, 496 (1968)], or by deciding an issue of first impression whose resolution was not clearly foreshadowed, *see, e.g., Allen v. State Board of Elections*, [393 U.S. 544, 572 (1969)]. Second, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' *Linkletter v. Walker*, [381 U.S. 618, 629 (1965)]. Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity.' *Cipriano v. City of Houma*, [395 U.S. 701, 706 (1969)]."

*Chevron*, 404 U.S. at 106-07. We therefore analyze this case under each of *Chevron*'s three factors to determine whether *Garcia* should be given retroactive effect.

In this case, the defendant reasonably relied on the law in force at the time it conducted labor negotiations, and it is unfair to make it suffer because of an unforeseen change in that law. For this reason, we conclude that the decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985), should not be applied retroactively to this case.

A.

The first part of the *Chevron* analysis counsels against retroactive application of a judicial decision if that decision establishes a new principle of law, either by overruling clear past precedent on which parties may have relied or by deciding an issue of first impression, the resolution of which had not been foreshadowed. *Chevron*, 404 U.S. at 106. The Port Authority claims that the *Garcia* case clearly overturned the prior law governing this case, and that applying *Garcia* now would be inequitable because it relied on the prior law in taking the position during collective bargaining that the Detectives were not entitled to time and one-half for overtime.

As the Port Authority structured its contract with the Detectives, it was not in compliance with certain aspects of FLSA. The Port Authority's conclusion that the terms of this contract were exempt from FLSA was based on the Port Authority's assessment of two questions of law. First, the Port Authority, an entity created by bi-state compact, is a state for the purposes of the Tenth Amendment and the *National League of Cities* case. Second, the Detectives were performing a traditional state function because they were engaged in the activity of police protection. In order for the 1980 contract between the Port Authority and the Detectives to be exempt from FLSA under the *National League of Cities* doctrine, the Port Authority must be regarded as a state and the work of the Detectives must be a police protection activity. When *Garcia* overruled *National*

*League of Cities*, these two issues became moot because all state activities became subject to FLSA.

We observe initially that the mere fact that the Supreme Court renders a decision overruling prior law is insufficient to satisfy the first part of the *Chevron* test. The party seeking nonretroactive application of the new decision must have relied on the prior law. Moreover, such reliance must have been reasonable. *Bronze Shield, Inc. v. N.J. Dept. of Civil Serv.*, 667 F.2d 1074, 1085 (3d Cir. 1981), *cert. denied*, 458 U.S. 1122 (1982); *Singer v. Flying Tiger Line Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981).

We have concluded that the Port Authority reasonably relied on the law prior to *Garcia* in determining that the instant contract would not be subject to FLSA. Neither party has cited case law holding that an authority created by a bi-state compact was not a state for the purposes of the Tenth Amendment. Moreover, as discussed in part IV(A) below, there are analogous cases under the Eleventh Amendment treating similar entities as states. It was reasonable for the Port Authority to rely on the statement in *National League of Cities* that police protection is a traditional state function[9] and to conclude that the Detectives are involved in police

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9. The Court in *National League of Cities* stated:

> "For even if we accept appellee's assessments concerning the impact of the [FLSA] amendments, their application will nonetheless significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services."

426 U.S. at 851.

The Administrator of the Wage and Hour Division of the Department of Labor promulgated several regulations on December

protection activity.[10] The dissent insists that because the Port Authority operates mass transit systems, and the status of such functions under *National League of Cities* has been unclear, the Authority was at risk in relying on the protection of that decision. However, the fact that the Authority includes mass transit among its many activities does not mean that the status of all its employees was in doubt. Even states and municipalities control entrepreneurial and other nontraditional public entities, but this does not affect the status of their traditional functions such as police protection. Indeed, the command of *National League of Cities* is to distinguish among those employees who perform traditional functions and those who do not.

We conclude that the *Garcia* decision, by overturning *National League of Cities*, overruled clear past precedent on which the Port Authority may have relied. Thus, the first prong of the *Chevron* test weighs against retroactive application of the *Garcia* decision.

B.

The second *Chevron* factor (404 U.S. at 106-07) requires us to consider the prior history of the new rule in question, and its purpose and effect, to determine if retroactive application will further or retard its operation.

The Port Authority contends that retroactive application of the *Garcia* decision is not necessary to insure future adherence to the decision. Now that the Supreme Court has ruled explicitly that no state employees are exempt from FLSA coverage, the Port Authority maintains, there is no reason to believe that states and municipalities will not comply in the future.

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21. 1979, which, in relevant part, restated and adopted the quoted language from *National League of Cities*. *See* 29 C.F.R. §§ 775.2(a), 775.4(a) (1985).

10. See discussion below in Part IV(C).

We agree. The *Garcia* decision makes the law clear that, in the future, states must comply with FLSA. Regardless of how we decide this case, there is no reason to suspect that states would refuse to be bound by FLSA. This situation leaves us free to decide the instant case on its facts and equitable principles without concern for furthering or retarding the operation of *Garcia*. This second *Chevron* factor neither favors nor opposes the retroactive application of the *Garcia* decision.

C.

The third prong of the *Chevron* test requires us to consider any inequities that would result from retroactively applying the new law (404 U.S. at 107). If retroactive application of *Garcia* would be inequitable, then this prong of the *Chevron* test would counsel against its retroactive application. As discussed above, the Port Authority apparently structured the contract with the Detectives based on the assumptions that it was a state for the purposes of *National League of Cities*, and that the Detectives were engaged in traditional state functions. In Part IV of this opinion, we decide that these assumptions are consistent with our interpretation of the law. In this section of the opinion, we analyze the Port Authority's actions when the employment agreement was entered into in 1980 to determine whether it would be inequitable to retroactively apply the *Garcia* opinion.

We decided in Part III(A) above that the two assumptions made by the Port Authority were reasonable.[11] The Port Authority was faced with a

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11. A full discussion of the merits of these two issues follows in Part IV of this opinion. The discussion is relevant both at this point and with respect to the first prong of the *Chevron* test. However, to avoid being repetitive, we do not address these issues until we reach the merits of the case. Our discussion here relates

situation where it had to predict what the law was on two different issues. It made a decision and based its contract thereon. As discussed below, we think that not only was the Port Authority's assessment of the law reasonable, it was also correct. Over four years later, the *Garcia* decision overruled the entire relevant body of case law. Applying *Garcia* retroactively would punish the Port Authority for having made a decision which we agree is based on an accurate assessment of the law at the time such decision was made. In the normal business setting, a party must take action and cannot wait indefinitely for precise judicial resolutions; courts should recognize this fact and not punish unfairly those who engage in reasonable business decision-making.

Any public or private organization must manage its revenues to most efficiently provide services at the lowest cost. When involved in labor negotiations, the organization possesses estimates of how many hours it thinks the employees will work and how much money it has to compensate them. Within those parameters, the organization may opt for various pay structures. For example, some employees may be paid more than others; some compensation may be deferred; or employees may get a higher base pay in return for reduced overtime pay. It appears that the last situation was present in the instant case. Reasonably believing itself to be unshackled from the restrictions of FLSA, the Port Authority offered an attractive base pay that was balanced by lower overtime compensation. The Detectives agreed to this arrangement. The retroactive application of *Garcia* to this situation would give the Detectives increased overtime pay without any reduction in base pay. To allow the Detectives to get a

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only to the possible inequities of applying the *Garcia* decision retroactively.

pay raise premised on retroactive application of an unforeseen decision that was made almost two years after the *end* of the contract period would be inequitable to the Port Authority and would constitute a windfall to the Detectives. *See Morrison, Inc. v. Donovan*, 700 F.2d 1374, 1376 (11th Cir. 1983).

Inasmuch as the Port Authority encountered an unresolved issue of law, on which it took a reasonable position, retroactive application of *Garcia* to foreclose its reliance on *National League of Cities* is not equitable. Employing the rule of *Garcia* in this case is thus contrary to both the first and third prongs of the *Chevron* test. *See Smith v. City of Pittsburgh*, 764 F.2d 188, 196 (3d Cir. 1985); *see also Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (plurality opinion); *id.* at 92 (Rehnquist, J., concurring).

IV.

We now turn to the *National League of Cities* case and its progeny to see if the Port Authority is exempt from FLSA with respect to overtime payments to the Detectives for the period from July 9, 1978, until July 3, 1983. As discussed above, the *National League of Cities* principle was clarified in *Hodel v. West Virginia Surface Mining & Recl. Assoc.*, 452 U.S. 264 (1981), where the Court said:

> "First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are indisputably 'attribute[s] of state sovereignty.' And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'"

*Id.* at 287-88 (citations omitted). We examine each of these three requirements and conclude that the Detectives in the instant case are not covered by FLSA for the above period.

A.

The first requirement of the *Hodel* test is that the challenged regulation must regulate "States as States." We must decide whether the Port Authority, an entity created by a bi-state compact, is a state for the purposes of the Tenth Amendment. This determination requires analysis because the Port Authority possesses certain federal incidents that a typical state agency lacks. However, after considering its federal traits and comparing them with its state traits, we conclude that the Port Authority is a "state" for the purposes of the first requirement of the *Hodel* test.

Article I, section 10, of the United States Constitution provides in relevant part: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ." U.S. Const. art. I, § 10. When the Port Authority was created in 1921, Congress consented to it. 42 Stat. 174 (1921). Similarly, when the Port Authority produced its Comprehensive Plan, it too was consented to by Congress. 42 Stat. 822 (1922). While Congress has not been involved in the structure or management of the Port Authority since 1922, there is language in both the Compact and the Comprehensive Plan that could be interpreted to provide for continuing control by Congress.[12] Arguably, this language could justify

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12. The Compact as approved by Congress provides:

"ART. 18. The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the Constitution of the United States or of either State, and subject

congressional control of the Port Authority through FLSA.

A similar issue was before the District of Columbia Circuit in *Tobin v. United States*, 306 F.2d 270

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to the exercise of the power of Congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both States, shall be binding and effective upon all persons and corporations affected thereby."

42 Stat. 178 (1921). The Compact also states:

". . . That the consent of Congress is hereby given to the said agreement, and to each and every part and article thereof: *Provided*, That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement.

"SEC. 2. That the right to alter, amend, or repeal this resolution is hereby expressly reserved."

42 Stat. 180 (1921).

The Comprehensive Plan approved by Congress states:

". . . That, subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching the jurisdiction and control of the United States over the matters, or any part thereof, covered by this resolution, the consent of Congress is hereby given . . . ."

42 Stat. 822 (1922). The Comprehensive Plan further states:

"And the consent of Congress is hereby given . . .: *Provided*, That nothing herein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement: *Provided further*, That no bridges, tunnels, or other structures shall be built across, under, or in any of the waters of the United States, and no change shall be made in the navigable capacity or condition of any such waters, until the plans therefor have been approved by the Chief of Engineers and the Secretary of War.

"SEC. 2. That the right to alter, amend, or repeal this resolution is hereby expressly reserved."

42 Stat. 826 (1922).

(D.C.Cir.), *cert. denied*, 371 U.S. 902 (1962). In that case, the District of Columbia Circuit reversed the conviction of the Executive Director of the Port Authority for contempt of Congress for failure to fully comply with a subpoena. The appellant argued that Congress lacked the power under the Compact Clause of the Constitution to "alter, amend or repeal"[13] its consent to the Compact which was the stated purpose of the investigating subcommittee. The court reversed the conviction, finding that the appellant had adequately complied with the subpoena. The court admitted its reluctance to resolve the issue of whether Congress could "alter, amend or repeal" the Compact.[14] We recognize the District of Columbia Circuit's reluctance and believe that this issue need not be resolved in this opinion. Our research has revealed no case holding that Congress possesses such a power.[15]

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13. The phrase "alter, amend or repeal" comes from the 1921 Compact and the 1922 Comprehensive Plan. 42 Stat. 178 (1921); 42 Stat. 822 (1922). *See* note 12.

14. The court, after stating that such power is not conferred by the Compact Clause, expressed reluctance to find such an implied power:

> "We have no way of knowing what ramifications would result from a holding that Congress has the implied constitutional power 'to alter, amend or repeal' its consent to an interstate compact. Certainly, in view of the number and variety of interstate compacts in effect today, such a holding would stir up an air of uncertainty in those areas of our national life presently affected by the existence of these compacts. No doubt the suspicion of even potential impermanency would be damaging to the very concept of interstate compacts."

*Tobin v. United States*, 306 F.2d at 273.

15. In *Riverside Irr. Dist. v. Andrews*, 568 F. Supp. 583 (D. Colo. 1983), *aff'd*, 758 F.2d 508 (10th Cir. 1985), the court stated in dicta that "congress cannot unilaterally reserve the right to amend

We note today only that the power of Congress to "alter, amend or repeal" is not currently part of the federal tradition. Since we are basing our conclusion that the Port Authority is a state for the purpose of the *Hodel* test on a balancing of its state and federal attributes, we feel it is not inappropriate to leave the resolution of Congress' power to "alter, amend or repeal" in this situation to another day.

One minor federal attribute of an interstate compact is that the compact itself becomes federal law. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). *But see Petty v. Tennessee-Missouri Comm'n*, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting). This characterization serves not to allow Congress to sidestep the Tenth Amendment but rather to give the federal courts federal question jurisdiction (*see Cuyler v. Adams*, 449 U.S. 433, 438 (1981)) and makes available the doctrine of preemption to prevent states from avoiding their compact obligations by citing contrary state law (*see West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).[16]

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or repeal an interstate compact." 568 F. Supp. at 589. The only authority put forward for this proposition was the *Tobin* case. The court held merely that a compact is not immune from subsequent federal legislation that affects it. The issue before the court was not whether compacts should be similarly treated as the states but rather whether compacts should be afforded a special status different than that to which the states were entitled. The court rejected the claim and found the legislation to be enforceable against the compact.

16. We note that the Supreme Court held that certain Port Authority employees were not state employees in *Helvering v. Gerhardt*, 304 U.S. 405, 423 (1938), in a case involving whether the federal income taxation of salaries of state employees contravened the Tenth Amendment. This doctrine was abandoned in *New York v. United States*, 326 U.S. 572 (1946). The decision in *Helvering* was based on a conclusion not that the Port Authority failed to constitute a state entity but that the Port Authority was a state-owned corporation rather than the state itself or a political

These few federal attributes notwithstanding, we have concluded that the Port Authority possesses sufficient state attributes to qualify as a state entity for the purposes of the first prong of the *Hodel* test. From its inception sixty-five years ago, the Port Authority has been an entity of the two compacting states. New York and New Jersey each appointed commissioners to investigate the possibility of an agreement. 1917 N.Y. Laws Ch. 426, p. 1325; 1917 N.J. Laws Ch. 130, p. 288. A joint report of the commissioners was submitted to the respective governors in 1920. The following year the states appointed commissioners to negotiate a compact. 1921 N.Y. Laws Ch. 203, p. 841; 1921 N.J. Laws Ch. 151, p. 412. The Compact was ratified by the states before being sent to Congress for consent. 1921 N.Y. Laws Ch. 154, p. 492; 1921 N.J. Laws Ch. 151, p. 412. The Comprehensive Plan was also drafted and ratified by the states before consent was given by Congress. 1922 N.Y. Laws Ch. 43, p. 61; 1922 N.J. Laws Ch. 9, p. 25. The history of the Port Authority reveals little federal involvement beyond its mere consent to the Compact and the Comprehensive Plan.

Moreover, the Port Authority is administered as a state agency. Each state appoints six commissioners who are to be residents of the respective states. N.J. Rev. Stat. § 32:1-5 (1963); N.Y. Unconsol. Laws § 6405 (McKinney 1979). There is no provision for the federal government to appoint commissioners. Since 1922, Congress has not consented to any state legislation regarding the Port Authority's structure and functions.[17] We view the Port Authority as an entity run

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subdivision. 304 U.S. at 423. Though the Solicitor General contended that the Port Authority was not a state because it was not created by the states alone, the Court did not address this contention. *See* 304 U.S. at 429 (Butler, J., dissenting).

17. Pursuant to the Comprehensive Plan, approval for bridges and tunnels has been granted by the War Department. 42

as an independent state agency with little or no supervision by the federal government.

Although the issue we face today has not been resolved in the context of the Tenth Amendment and the *National League of Cities* case, there are cases involving the Eleventh Amendment[18] that we find instructive. Courts have held that entities created by compact qualify as a state for the purpose of enjoying the immunity of the Eleventh Amendment. For example, in *Howell v. Port of New York Authority*,[19] 34 F. Supp. 797 (D.N.J. 1940), the court was faced with the argument that the Port Authority was a municipal corporation and not a state agency. The court discussed the composition of the Port Authority and its role of serving primary governmental functions of the states before concluding:

> "The Port Authority, a bi-state corporation. . . . is a joint or common agency of the states of New York and New Jersey. It performs governmental functions which project beyond state lines, and it is immune from suit without its consent.

34 F. Supp. at 801.

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Stat. 822, 826 (1922). This review was apparently based on the federal concern for supervising navigation.

18. The Eleventh Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, *or* by Citizens or Subjects of any Foreign State."

U.S. Const., amend. XI.

19. The Port Authority was originally called the "Port of New York Authority." As of July 1, 1972, the name was changed to the "Port Authority of New York and New Jersey." N.J. Rev. Stat. § 32:1-4 (West Supp. 1985); N.Y. Unconsol. Laws § 6404 (McKinney 1979).

More recently, the Second Circuit was faced with the same issue involving the Palisades Interstate Park Commission, an entity formed by compact between New York and New Jersey. The court noted that any judgment would have to be paid from the state treasuries and stated: "We fail to perceive any reason why a bi-state commission cannot, when sued in the federal court, enjoy the Eleventh Amendment immunity of its signatory states." *Trotman v. Palisades Interstate Park Com'n*, 557 F.2d 35, 38 (2d Cir. 1977).

The Supreme Court had opportunity to address the issue in *Petty v. Tennessee-Missouri Comm'n*, 359 U.S. 275 (1959), but instead assumed, *arguendo*, that the suit be treated one as against a state. The Court then found that the commission had waived any immunity it might have had.[20] In the Eighth Circuit, in the same case, the court had reached the issue and found "the defendant Commission was the agency or instrument of the two States and not an entity separate and apart from the States." *Petty v. Tennessee-Missouri Bridge Commission*, 254 F.2d 857 (8th Cir. 1958), *rev'd on other grounds*, 359 U.S. 275 (1959).

These Eleventh Amendment cases demonstrate that the courts are willing to treat entities created by interstate compacts as states.[21] We agree that in the

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20. The Court was split into three groups of three justices. The three dissenting justices could find no waiver of immunity. The three concurring justices joined with the opinion of the Court but clarified that the Court had not reached the issue of whether bi-state commissions can be immunized under the Eleventh Amendment.

21. The Supreme Court rejected a *per se* rule in *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1979), stating that each compact must be considered based on its own attributes to determine if it is entitled to Eleventh Amendment

analogous situation presented in this case that the Port Authority, an entity created by an interstate compact, should be treated as a state for the purposes of the *National League of Cities* doctrine.[22]

B.

The second requirement of the *Hodel* test is that the federal regulation must address matters that are indisputably attributes of state sovereignty. 452 U.S. at 287-88. The attribute in question in the instant case is overtime wages paid to employees. The *National League of Cities* case makes clear that overtime wages are an attribute of state sovereignty. The Court concluded: "Our examination of the effect of [applying FLSA] to the States and their political subdivisions, satisfies us that both the minimum wage and the maximum hour[23] provisions will impermissibly interfere with the integral governmental functions of these bodies." 426 U.S. at 851. We conclude that the second requirement of the *Hodel* test is met.

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immunity. This reasoning is applicable to Tenth Amendment cases too. We do not today hold that all entities created by interstate compacts are states for the purpose of *National League of Cities*. Our holding is limited to finding that the Port Authority is a state for the purposes of resolving the instant case.

22. *See also* Derian, *Defining the 'State as State': Is a Nonprofit Corporation Under Contract with a State to Perform an Integral Government Function Entitled to Immunity from the Fair Labor Standards Act under the National League of Cities?*, 10 Hasting Const. L. Q. 877, 913 (1983) ("Simply stated, an entity which is government owned, managed by directors appointed by government officials, and statutorily designated as a public corporation should be presumed to be governmental") (footnotes omitted).

23. "Maximum hour" as used in FLSA and *National League of Cities* is essentially synonymous with overtime wages.

C.

The third requirement of the *Hodel* test is that it must be apparent that the states' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional governmental functions. 452 U.S. at 288. We conclude that the Detectives are engaged in a traditional governmental function.

In *National League of Cities*, the Court stated:

> "[The application of FLSA to the States will] significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, *police protection*, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services. Indeed, it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens."

426 U.S. at 851 (emphasis added) (footnote omitted). Thus, we are instructed that police protection is a traditional governmental function. If the Detectives are performing a police function, then the third requirement of the *Hodel* test (452 U.S. at 288) is satisfied.[24]

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24. We need not decide whether all Port Authority employees are performing traditional governmental functions. The issue before us is limited to the plaintiffs who are detectives. We heed the advice of Judge Adams:

> "In resolving the issues raised, we must be mindful that our judicial power extends only to deciding the specific case presented to us. While attempting to maintain the essential

Notwithstanding the fact that the Detectives are not uniformed patrolmen, we believe that they are clearly involved in the activity of police protection. The detective who appears at the scene of the crime, interviews witnesses, and pursues suspects is at the very heart of our system of police protection. Webster's New Collegiate Dictionary (p. 882, 1979 ed.) defines "police" to include "the department of government charged with prevention, detection and prosecution of public nuisance and crimes." This language indicates a scope encompassing more than just a patrolman -- it includes the people investigating reported crimes.[25] Moreover, as members of the Port Authority police force, the Detectives "have all the powers conferred by law on police officers or constables in the enforcement of laws of this state and the apprehension of violators thereof." N.J. Stat. Ann. § 32:2-25 (1963). *Accord*, N.Y. Crim. Proc. L. § 1.20, subdivision 34(k) (McKinney 1981); *State v. Cohen*, 73 N.J. 331, 337, 375 A.2d 259, 262 (West 1977). *See also Grand Rapids & I. Ry. Co. v. King*, 41 Ind. App. 701, 707, 83 N.E. 778, 780 (1908) (a detective is a "policeman whose business is to detect rogues by adroitly investigating their haunts and habits") (citing Webster's Dict.); *Com., Hum. Rela. Com'n v. Beaver Falls City Council*, 469 Pa. 522, 527,

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role of federal courts both in preserving a healthy relationship between the nation and the states and in protecting constitutional rights, the federal judiciary must be alert to the dangers inherent in deciding cases more broadly than required by the precise issues presented. The goal must be reasoned, principled results based solely upon grounds necessary to the disposition of the controversy."

*Conover v. Montemuro*, 477 F.2d 1073, 1083-84 (3d Cir. 1973) (Adams, J., concurring). *See also* 477 F.2d at 1093.

25. We decide only the issue presented to us today. We express no opinion as to whether other officials, such as prosecutors, are engaged in the police protection.

366 A.2d 911, 914 (1976). For these reasons, we conclude that plaintiffs as detectives are engaged in police protection which is a traditional governmental function for the purposes of the third requirement of the *Hodel* test.

V.

In light of our decision that all three requirements of the *Hodel* test are satisfied, we hold that the application of the overtime wage provisions of the Fair Labor Standards Act to the plaintiff-Detectives during the period from 1978 to 1983 would be a violation of the doctrine announced by the Supreme Court in *National League of Cities v. Usery*, 426 U.S. 833 (1975). We will reverse the district court's denial of the Port Authority's motion to dismiss and will remand the case to the district court with directions to dismiss this civil action (No. 80-03307, D.N.J.).

BECKER, *Circuit Judge*, dissenting:

I believe the majority has misapplied the *Chevron* test to this case. Unlike my colleagues, I find that application of the first and second prongs of the test weighs in favor of retroactive application of *Garcia*. In my view, only the third prong may favor non-retroactive application, but, in weighing the equities as the third prong requires, I do not find them definite or significant enough to tip the balance. Because I conclude that *Garcia* should be the governing law in this case, I respectfully dissent.

*I.*

As the majority has noted, the fact that the Supreme Court renders a decision overruling prior law is insufficient to satisfy the first part of the *Chevron*

test. Rather, the party seeking nonretroactive application of the new decision must have relied on the prior law, and such reliance must have been reasonable. Where application of prior law has been erratic and inconsistent, a subsequent decision overruling that law cannot be said to have overruled clear past precedent on which the parties may reasonably have relied. *See Smith v. City of Pittsburgh*, slip op. at 14 (3d Cir. June 12, 1985); *Perez v. Dana Corp., Parish Frame Div.*, 718 F.2d 581, 585 (3d Cir. 1983).

Here, although the Supreme Court's decision in *Garcia* to overrule *National League of Cities* was hardly predictable, the application of the *National League of Cities* principle to cases involving state employees not specifically identified by the Court as performing traditional governmental functions had been quite erratic and inconsistent. Indeed, this inconsistency in application served as a primary reason for the Court's decision to overrule *National League of Cities*.[1] *Id.* at 1016. The Court observed that under the traditional governmental function test set forth in *National League of Cities* and elaborated upon

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1. *Compare* Amersbach v. City of Cleveland, 598 F.2d 1033, 1037 (6th Cir. 1979) (operation of an airport is traditional *with* Hughes Air Corp. v. Public Utilities Comm'n, 644 F.2d 1334, 1340 (9th Cir. 1981) (regulation of air transportation is not traditional); *compare* Enrique Molina-Estrada v. Puerto Rico Hwy. Auth., 680 F.2d 841, 845 (1st Cir. 1982) (building and maintaining public roads is traditional) *with* Friends of the Earth v. Carey, 552 F.2d 25, 38 (2d Cir.) (regulating traffic on public roads is not traditional), *cert. denied*, 434 U.S. 902 (1977); *compare* N.L.R.B. v. Highview, Inc., 590 F.2d 174, 178 (5th Cir. 1979) (operation a nursing home is traditional) *with* Bonnette v. California Health & Welfare Agency, 704 F.2d 1465, 1472 (9th Cir. 1983) (provision of in-house domestic service for aged and handicapped is not traditional).

in *Hodel v. West Virginia Surface Mining and Recl. Assoc.*, 452 U.S. 264 (1981), courts had experienced insurmountable difficulties identifying those governmental functions that were traditional and those that were not and that, as a result, they had come to fundamentally inconsistent conclusions.

The majority is unmoved by the erratic prior law on this point. It points to language in *National League of Cities* and subsequently promulgated Department of Labor regulations which explicitly consider "police protection" as a "traditional governmental function," and concludes that the detectives were clearly excluded from coverage of the FLSA. Therefore, the majority concludes, the Port Authority's reliance on *National League of Cities* (and the Department of Labor regulations) in denying overtime pay to the detectives was reasonable.

For me, the matter is not so simple. The Port Authority acts to a significant extent as a transit authority.[2] Department of Labor regulations existing prior to the execution of the collective bargaining agreement at issue here specifically identified the operation of local mass transit systems as not being a traditional governmental function.[3] Subsequent

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2. In addition to operating bridges, tunnels, seaports, airports, and other facilities of transportation and commerce, the Port Authority operates a commuter railroad through its wholly owned subsidiary, the Port Authority Trans Hudson Corportation. *See* N.Y. Unconsol. Laws §§ 6603, 6612 (McKinney 1979); N.J. Stat. Ann. §§ 32:1-35.52, 32:1-35.61 (West 1963 & Supp. 1985). *Cf.* 29 C.F.R. § 775.2:

3. On December 21, 1979, the Administrator of the Wage and Hour Division of the Department of Labor promulgated regulations giving its interpretation of non-traditional governmental functions:

> **§ 775.2 Special enforcement policy concerning States and political subdivisions.**

decisional law confirmed this position. *See United Transportation Union v. Long Island R. Co.*, 455 U.S. 678, 686 (1982); *Kramer v. New Castle Area Transit Authority*, 677 F.2d 308, 310 (3d Cir. 1982), *cert. denied*, 459 U.S. 1146 (1983). The majority suggests that the Port Authority should be treated like a state or municipality, with its employees treated disparately according to their functions. While this approach is plausible, it is by no means self-evident, and there is no caselaw support for it. Thus there was no clear

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(a) On June 24, 1976, the United States Supreme Court ruled in *National League of Cities, et al. v. Usery*, 426 U.S. 833, that the minimum wage and overtime compensation provisions of the Fair Labor standards Act (FLSA) are not constitutionally applicable to the integral operations of the States and their political subdivisions in areas of traditional governmental functions. Such areas include, among others, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation. They do not include, amoung [sic] others, the operation of a railroad by a State. 426 U.S. at 854, n.18

**§ 775.3 Nontraditional functions of States and their political subdivisions.**

(a) In the *National League* decision it was made clear that the operation of a railroad by a State or its political subdivision is not an integral operation in the area of traditional governmental functions. 426 U.S. 833, 854 n.18.

(b) For the purpose of the notice referred to in § 775.2(b), the Administrator has determined that the following functions of a State or its political subdivisions are not traditional . . . . The date listed after each function is the date of original publication in the *Federal Register* . . .

. . . .

(3) Local mass transit systems December 21, 1979.

29 C.F.R. § 775.3 (1984).

authority for the proposition that the detectives were excluded from FLSA coverage.

Moreover, although appellees are authorized to serve as law-enforcement officers by statutes of New York and New Jersey, they are employed by the Port Authority and not by the two states or any of their municipalities. As such, they perform some duties that would not be performed by policemen working directly for New York, New Jersey, or a municipality therein, including conducting character investigations of Port Authority employees, enforcing Port Authority regulations, and investigating complaints against Port Authority personnel. Thus, appellees are not necessarily the type of policemen that the Supreme Court intended to exclude from coverage of the FLSA by the *National League of Cities* decision.[4]

In view of the inconsistent prior law, *see supra* note 1, and the strong indication in the case law that transit workers were not covered, the Port Authority should have recognized the precariousness of its position that its detectives were exempt from FLSA coverage under *National League of Cities* jurisprudence. By failing to comply with the FLSA's overtime requirements, the Authority was at risk that it might be found liable for overtime pay by a subsequent judicial determination that the detectives were covered by the FLSA.

I conclude, therefore, that it was not reasonable for the Port Authority to have relied on the law as it existed prior to *Garcia* for the position that its police detectives were exempt from FLSA coverage. The first of the *Chevron* factors thus weighs in favor of the retroactive application of the *Garcia* decision.

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4. Given my view of the appropriate disposition of this case, I need not express an opinion on the other aspects of the majority's analysis in Part IV.

*II.*

The second *Chevron* factor requires us to consider the prior history of the new rule in question, and its purpose and effect, to determine if retroactive application will further or retard its operation.

The majority's analysis of the second prong of *Chevron* is limited to whether that retroactive application of the *Garcia* decision would discourage future adherence to the decision. I agree with the majority that, given the Supreme Court's explicit ruling that no state employees are exempt from FLSA coverage, there is no reason to believe that states and municipalities will not comply in the future. This finding does not, however, exhaust the inquiry as to whether retroactive application of *Garcia* will retard or further the operation of that holding.

I believe that non-retroactive application of *Garcia* results in the unseemly spectacle of the court's deciding this case under a pre-existing analytical framework that the Supreme Court has found to be unsound in principle and unworkable in practice.[5] *Garcia*, 105 S.Ct 1016. Thus, in Part IV of its opinion the majority is forced to apply an analysis that the Supreme Court has denigrated as "not faithful to the role of federalism in a democratic society" and "disserve[ing] principles of democratic self-governance." *Id.* at 1015, 1016. Moreover, this court's continued recognition of exemptions in the coverage of the FLSA that were created solely by the judicial branch and have since been invalidated would constitute an unjustifiable intrusion into the legislative branch's

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5. It may seem as though this factor would always suggest retroactive application of a Court decision. That is not so: sometimes the Court overturns prior law as the result of changed circumstances rather than because the earlier decision was analytically unsound and unworkable.

authority and an unwarranted divergence from congressional intent.

For these reasons, I believe that retroactive application would further the operation of the new rule: the second prong of the *Chevron* test, therefore, also points strongly in the direction of retroactive application of *Garcia*.[6]

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6. I disagree with the Port Authority's argument that the retroactive application of *Garcia* might retard the purposes of the FLSA because huge lump-sum backpay awards resulting from retroactively applying FLSA wage and hour requirements would be inconsistent with Congress's intent to impose the FLSA burden on states gradually. First, the Port Authority's assertion that Congress intended to phase in FLSA coverage over state and local governments gradually is incorrect. The 1974 FLSA amendments specified that FLSA coverage over the employees of state and local governments begin immediately, as of May 1, 1974. H. Conf. Rep. No. 953, 93rd Cong., 2d Sess. 30, *reprinted in* 1974 U.S. Code Cong. & Ad. News 2811, 2867. Furthermore, retroactive application of *Garcia* so as to compel states to compensate workers for past work according to the provisions of the FLSA would not place any greater financial burden on the states than that which was originally contemplated by Congress. Indeed, because suits by state employees to enforce FLSA provisions are subject to a two-year statute of limitations, *see* 29 U.S.C. § 255(a)(1982), states can be potentially liable for backpay only for two years prior to the date the *Garcia* decision was rendered. (The Act also provides for a three-year statute of limitation for willful violations of the FLSA. *See* 29 U.S.C. § 255(a)(1982)). Congress, on the other hand, intended the FLSA's overtime provision to apply to state employees beginning May 1, 1974. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259 §§ 6, 29, 88 Stat. 55, 58-59, 76. Thus, retroactive application of *Garcia* to state employees' suits under the FLSA will result in a financial burden to states that is much less than what the states would have borne had they complied with the FLSA beginning in 1974 as Congress had intended.

*III.*

Part III of the *Chevron* test requires consideration of any inequities that would result from retroactively applying the new law. First, the Port Authority argues that it relied in good faith on *National League of Cities*, as well as Department of Labor regulations, in maintaining its position that plaintiffs were not covered under the FLSA, and thus that it would be inequitable for the court to now enforce the FLSA retroactively. As I have explained, given the uncertainty of the pre-existing law, the Port Authority was at risk that the detectives might not be exempted from FLSA coverage; hence it would not be manifestly unjust if the Authority were found liable under the FLSA as a result of our directing the district court to apply *Garcia* in this case.[7]

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7. Under my view of the case, even if *Garcia* is applied retroactively, the Port Authority may still be able to avoid liability to the detectives under the FLSA by asserting the Portal-to-Portal Act good-faith defense. This defense is designed to protect from liability employers who acted in reliance on an interpretation of the law by a governmental agency, even if the agency's interpretation is subsequently determined to be incorrect. Equal Employment Opportunity Comm'n v. Home Ins. Co., 672 F.2d 252, 263 (2d Cir. 1982). An employer who relies in good faith upon a written administrative regulation, order, or ruling of the Administrator of the Wage and Hour Division of the Department of Labor will not be subject to liability for its failure to pay minimum wages or overtime compensation as required by the FLSA. *See* 29 U.S.C. § 259 (1982). My conclusion that the law was too unsettled to bar retroactive application does not decide the validity of a Portal-to-Portal defense. Thus, on my view, the Port Authority would be able to assert this defense on remand, and, if the district court found the existence of such good-faith reliance on Port Authority's part, no FLSA liability would ensue.

Second, the Port Authority contends that a backpay award compensating appellees one and one-half times their regular hourly rate for past overtime hours is inappropriate because it would constitute a windfall. According to the Port Authority, the police detectives were paid 25% an hour more than other Port Authority police and accepted this premium in exchange for not receiving time and one-half for overtime, which was being paid to the other police. Thus, Port Authority maintains that retroactive application of *Garcia* would result in a financial windfall to the detectives. *See Morrison, Inc. v. Donovan*, 700 F.2d 1374, 1376 (11th Cir. 1983). The detectives deny that their premium hourly rate of pay was made in lieu of overtime, asserting that this rate was greater than that of other Port Authority police because they performed extra duties.

It is thus unclear whether retroactive application of *Garcia* would result in a windfall (though the majority, without explanation, adopts the Port Authority's position on this point). This poses no problem in any event because retroactive application of *Garcia* does not require that we stipulate the base hourly rate that the district court should use in determining a backpay award for overtime compensation if the Port Authority is found to be liable. Rather, I believe the district court should determine whether the detectives agreed to a higher hourly rate in lieu of time and one-half for overtime and, therefore, that the parties would have agreed to a different base pay had overtime been included in the wage package. The court would take such facts into account when determining the appropriate base rate with which to calculate overtime compensation. My proposed application of *Garcia* to this case, therefore, would not subject the Port Authority to an unjustly

large assessment of damages and provide the detectives with a windfall.[8]

Finally, the majority believes that a lump-sum backpay award to the detectives for past overtime would be inequitable to the Port Authority. I recognize that the potential liability of Port Authority may be significant, and I do not consider this factor lightly. Nevertheless, the amount of such liability is highly speculative at this stage,[9] and ought to be balanced against the inequities to workers occasioned by their lower wages, a situation resulting from the subsequently overturned *National League of Cities* holding. Moreover, my concern about Port Authority's potential financial liability is tempered by the two-year limitations period for FLSA actions of this sort, *see supra* n.6. Thus, the potential financial hardship imposed on the Port authority is not definite or significant enough to tip the balance in favor of a non-retroactive application of *Garcia*.

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8. In a similar vein, I reject the Port Authority's argument that, if it is found liable to the detectives for back overtime wages as a result of a retroactive application of *Garcia*, it will also incur a liquidated damages-penalty in an amount equal to the amount of back wages owed. I recognize that an employer found liable under the FLSA for unpaid overtime compensation is subject to a liquidated damages penalty in an amount equal to the amount of unpaid compensation. *See* 29 U.S.C. § 216(b)(1982). Nevertheless, the assessment of this penalty is discretionary. The district court may award no liquidated damages if an employer sufficiently demonstrates that it had reasonable grounds for believing that its actions did not violate the FLSA. *See* 29 U.S.C. § 260 (1982). Thus, even if found liable, the Port Authority would not necessarily be subject to a liquidated damages penalty.

9. The parties have not been able to quantify with any degree of accuracy the amount of potential damages in this action because they conducted only limited discovery before the case was certified for an interlocutory appeal.

*IV.*

I conclude, therefore, that application of the *Chevron* test dictates that the Supreme Court's *Garcia* decision should serve as the governing law in this case. I would thus answer the district court's certified question by holding that the wage and hour provisions of the FLSA apply to the class of Port Authority employees consisting of police detectives represented by the plaintiffs.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

OPINION DATED SEPTEMBER 29, 1982

| | | |
|---|---|---|
| VITTORIO MINEO, etc. | : | UNITED STATES |
| | : | DISTRICT COURT |
| Plaintiffs, | : | DISTRICT OF |
| | : | NEW JERSEY |
| v. | : | |
| | : | Civil #80-3307 |
| | : | |
| PORT AUTHORITY OF NEW YORK AND NEW JERSEY, | : | OPINION |
| | : | |
| Defendants. | : | |

LACEY, D. J.

Plaintiff, Vittorio Mineo, filed a complaint purporting to represent himself and a class of "all other police officers of the Port Authority heretofore and hereafter subjected to and affected by the improper and unlawful practice of the Port Authority...in failing to pay extra duty compensation to Plaintiff and others similarly situated." Plaintiff subsequently obtained leave of the court to amend his complaint to assert a cause of action under the Fair Labor Standards Act, 29 U.S.C., Sections 201,

et seq. Thereafter, plaintiff moved to further amend his complaint to add Frank Carlomagno as a named plaintiff, and for an order pursuant to Rule 23 of the Federal Rules of Civil Procedure to maintain this action as a class action. Plaintiff was permitted to add Carlomagno as a party plaintiff. The court further ordered that so much of the complaint as alleges a violation of Port Authority Rules or Instructions shall proceed as a Rule 23 class action and that the portion of the complaint alleging a violation of the Fair Labor Standards Act shall proceed as a class action pursuant to the procedural rule of that Act.

Defendant Port Authority now moves to dismiss this lawsuit on the ground that the Fair Labor Standards Act is inapplicable to employees of the Port

Authority. Specifically, defendant contends that National League of Cities v. Usery, 426 U.S. 833 (1976), and its progeny bar plaintiffs' suit because defendant is involved in traditional governmental functions. Defendant's argument in support of this contention is two-pronged. First, defendant argues that Port Authority has been held to be in the position of "the State" whenever the issue has arisen; its property has been held exempt from taxation as property of the State; it has been held to be within the scope of the State's sovereign immunity from suit; and it has been held to be exempt from municipal regulations. See, e.g., Port of New York Authority v. Linde Paper Co., 127 N.Y.S.2d 155, 158-59 (1953). Second, defendant argues that plaintiffs, as non-uniformed police officers of the

Port Authority, with arrest authority conferred upon them by the States of New York and New Jersey, perform a traditional governmental function, see, e.g., State v. Cohen, 73 N.J. 331 (1977), and thus cannot avail themselves of the Fair Labor Standards Act.

In National League of Cities v. Usery, supra, the Court ruled that Congress had exceeded its powers under the commerce clause when it amended the Fair Labor Standards Act in 1974 to include within the Act's minimum wage and maximum hour provisions almost all employees of states and their political subdivisions. The Court stated:

> We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not

> within the authority granted Congress by Art. I, Section 8, cl. 3.

Id. at 852.

Although the Court did set forth some examples of "areas of traditional governmental functions" in National League of Cities, e.g., police protection, fire prevention, sanitation, and public health services, it did not provide a method of identifying precisely which activities constituted traditional governmental functions. However, in Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264, 289-88 (1981), the Court announced a three-part test for evaluating whether a commerce clause regulation contravenes the tenth amendment:

> (I)n order to succeed, a claim that Congressional commerce power legislation is invalid under the reasoning

> of National League of Cities must satisfy each of three requirements. First, there must be a showing that the challenged regulation regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute(s) of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional governmental function." (citations omitted)

This test was reiterated in United Transportation Union v. LIRR, ____ U.S. ____ , ____ , 102 S. Ct. 1349, 1354 (1982).

The third circuit recently applied the three-part test in Kramer v. New Castle Area Transit Authority, 677 F.2d 308 (3d Cir. 1982). There, twenty-one plaintiffs employed as bus operators by the New Castle Area Transit Authority (Authority), appealed from the grant of

summary judgment in favor of the defendant in their suit for overtime pay under the Fair Labor Standards Act. The Authority is a political subdivision of the Commonwealth of Pennsylvania, and the district court dismissed the complaint in reliance on National League of Cities v. Usery, supra. The third circuit reversed.

The court in Kramer held that the Authority did not satisfy the third portion of the Hodel test, i.e., it was not an integral operation in an area of traditional governmental function. According to the court, "state involvement in local transit systems 'is not among the functions traditionally performed by state and local governments.'" Kramer v. New Castle Area Transit Authority, supra, 677 F.2d at 310. (emphasis in

original) Cf. United Transportation Union v. LIRR, supra, at 1354 (same conclusion reached with respect to commuter railroads).

The court in Kramer based this conclusion on the observation that the involvement of states in the mass transit field was in large part created by the national government. See, e.g., Urban Mass Transit Act of 1964, Pub. L. No. 88-365, 78 Stat. 302, codfied at 49 U.S.C. Sections 1601 et seq. Therefore, the court stated, the states could not claim that mass transit is a service which they have traditionally performed.

I believe these authorities and the considerations of the particular case require denial of the motion to dismiss upon the asserted grounds. First, it must be emphasized that the

Port Authority is a bi-state agency, created by compact between New York and New Jersey with the consent of Congress. See N.J.S.A. 77, 67th Cong. 1st Sess., 42 Stat. 174. Thus, it is not entirely clear that the Authority is acting in the capacity of a State as State."

In any event, I feel it is unnecessary to resolve this issue, given the holding of Kramer, supra, that mass transit does not constitute an integral state function. Thus, the Authority, engaged as it is in the business of mass transit, cannot successfully come within the ambit of National League of Cities. (Fn 1). As did the court in Kramer, I feel this court should focus upon the subject matter of the particular enactment, in this case mass transit operations, and

not upon the functions performed by those whose employment is an incident of the state's participation in the particular field. (Fn 2).

Accordingly, the motion of the defendant Port Authority for dismissal of the complaint is denied.

/S/ Frederick B. Lacey
FREDERICK B. LACEY
UNITED STATES DISTRICT JUDGE

Dated: September 29, 1982

Fn 1. The statutory scheme by which the Port Authority operates makes it clear that the Authority is engaged in the business of mass transit. For example, N.J.S.A. 32:1-7 provides, in relevant part:

> The Port Authority shall constitute a body, both corporate and politic, with full power to purchase, construct, lease and/or operate any terminal or transportation facility within said (Authority) district ....

Elsewhere, the same statute refers to tunnels, bridges, and belt lines, which are all attributes of "mass transit." See, e.g., N.J.S.A 32:1-27; 32:1-28;

32:1-30. Thus, it is clear from the statutory framework that the Authority is engaged not in an area of traditional state functions such as fire prevention or public health, but rather in the business of mass transit, which the third circuit has found to be outside the reach of National League of Cities, supra.

Fn 2. This court has considered the recent opinion in Equal Employment Opportunity Commission v. Elrod, 674 F.2d 601 (7th Cir. 1982), in which the constitutionality of the Age Discrimination in Employment Act, 29 U.S.C. Sections 621, et seq., insofar as it applies to state and local governments, was challenged. The seventh circuit found 1) that ADEA was enacted under Congress' power under Section 5 of the Fourteenth Amendment and that National League of Cities was thus inapplicable, and 2) assuming that ADEA was enacted under the commerce clause it was nevertheless valid because it did not interfere with the States' ability to structure integral functions. Elrod is inapplicable to the instant case, where the inquiry is upon whether the activity of the Authority constitutes an integral state function.

ORDER DENYING PETITION FOR REHERING
DATED FEBRUARY 6, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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NO. 83-5588

---

VITTORIO MINEO and FRANK CARLOMAGNO on behalf of themselves and all others similarly situated.

Appellees

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY.

Appellant

(C.A. No. 80-03307)

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SUR PETITION FOR REHEARING IN BANC

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Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, and VAN DUSEN, *Circuit Judges*

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing,

and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT.

/s/ Arlin M. Adams
Circuit Judge

Dated: February 6, 1986

GIBBONS, *Circuit Judge*, dissenting from an order denying rehearing in banc.

Vittorio Mineo, an employee of the Port Authority of New York and New Jersey, is the plaintiff in an action seeking to recover, on behalf of a class of Port Authority employees, overtime pay due under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1982). The case came to this court on the Port Authority's appeal, pursuant to 28 U.S.C. § 1292(b) (1982), from an order denying its motion to dismiss. That motion was predicated on the decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), holding that the tenth amendment precluded application of the Fair Labor Standards Act to instrumentalities of state government. The district court denied the Port Authority's motion because the Supreme Court had specifically overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985). A divided panel of this court reversed the denial of the Port Authority's motion, and ordered the action dismissed for the stated reason that *Garcia* should not be applied retroactively. Mineo petitioned for rehearing in banc. That petition should have been granted, for the decision of the panel majority is patently lawless.

In 1974, Congress amended the Fair Labor Standards Act to require payment of overtime pay by governmental instrumentalities that had previously enjoyed a statutory exemption. Fair Labor Standards Act of 1974, Pub. L. No. 93-259, 88 Stat. 55, 59. That statute has been in place at all relevant times. In *National League of Cities*, a decision which many commentators thought to be aberrational, a majority of the Court held that the amended Act could not apply to the governmental parties before it. Neither Mineo not the Port Authority were parties to the *National League of Cities* lawsuit, and no class determination was made in that action. Thus, the Port Authority cannot, and apparently does not, contend that it could assert judgment preclusion against its employees by virtue of the decision.

By characterizing the issue as the nonretroactivity of *Garcia*, the panel majority in effect has suspended the operation of the Fair Labor Standards Act for Port Authority employees. There is no legal authority for this or any other court to suspend the operation of an act of Congress in the circumstances of this case.

There are four sources for rules of decision in the federal courts: federal statutes, federal common law, state law, and the United States Constitution. That listing exhausts the possibilities. The panel majority does not purport to interpret a federal statute. Indeed, a suggestion that the majority's holding reflects congressional intent would be ludicrous. Congress spoke in 1974, and Congress has never retreated from its decision to extend the coverage of the Fair Labor Standards Act. In addition, state law cannot furnish the rule of decision which the majority applies, for, consistent with the supremacy clause, no state law rule of decision can be applied if it is inconsistent with a federal statute.

The majority relies on federal common law, of which *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), is a part, for its rule of decision. Federal common law, however, never can be applied in contravention of the will of Congress expressed in a duly enacted statute. Thus, if there is a federal statute which in express terms imposes liability, operation of that statute may be suspended in given cases only if the statute can reasonably be construed to permit such suspension. The majority opinion does not engage in statutory interpretation, for the good and sufficient reason that neither the Fair Labor Standards Act nor any other federal statute can be so construed. That leaves the Constitution.

I look in vain in the panel opinion for any reference to a constitutional provision that would authorize the court to suspend the operation of a duly enacted and now unquestionably constitutional federal statute. Since the panel majority fails to enlighten me as to the source of its rule of decision, I speculate that the majority may have been thinking of the due process clause of the fifth amendment. To justify the suspension of the Fair Labor Standards Act as a matter of due process, however, one must posit that *National League of Cities* created a vested property interest, within the meaning of the fifth amendment, in the Port Authority. Judgments may in some circumstances create vested property interests in parties. The proposition that majority opinions of the Supreme Court, or any other court, create vested property interests protected by the due process clause in non-parties, however, seems to me quite indefensible.

No federal statute, no federal common law rule, no provision of state law and no provision of the Constitution justifies the rule of decision announced by the majority. There are no other sources of law to

which the court may look. Thus the judgment in favor of the Port Authority is a striking example of judicial lawlessness. I would grant rehearing in banc and affirm the order denying the Port Authority's motion to dismiss.

Judge Becker would grant rehearing for the reasons stated in his dissenting opinion.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

ORDER DATED SEPTEMBER 29, 1982

| | | |
|---|---|---|
| VITTORIO MINEO, etc. | : | UNITED STATES |
| | : | DISTRICT COURT |
| Plaintiffs, | : | DISTRICT OF |
| | : | NEW JERSEY |
| v. | : | |
| | : | Civil #80-3307 |
| | : | |
| PORT AUTHORITY OF NEW YORK AND NEW JERSEY, | : | ORDER |
| | : | |
| Defendants. | : | |

This matter having been brought before the court by defendant's motion to dismiss, and the court having considered the submissions of counsel and argument having been heard;

IT IS ORDERED this 29th day of September, 1982, that the motion of defendant to dismiss is denied, all in accordance with an opinion filed this date with the Clerk of the court.

/S/ Frederick B. Lacey

FREDERICK B. LACEY
UNITED STATES DISTRICT JUDGE

ORDER DATED NOVEMBER 15, 1982

| | | |
|---|---|---|
| VITTORIO MINEO, ET AL., | : | UNITED STATES DISTRICT COURT |
| Plaintiffs, | : | DISTRICT OF NEW JERSEY |
| v. | : | |
| | : | Civil #80-3307 |
| PORT AUTHORITY OF NEW YORK AND NEW JERSEY, | : | ORDER AMENDING ORDER FILED SEPTEMBER 29, 1982 |
| Defendants. | : | |

It appearing that plaintiffs' response to defendant's motion to dismiss included a request that this court enter partial summary judgment "on the issue of liability of the defendant," and this court having reviewed the pleadings, depositions, answers to interrogatories, and admissions on file;

IT IS ORDERED that the Order filed September 29, 1982 is amended to add the following:

Plaintiff's cross-motion for partial summary judgment is denied, for

the reason that a material fact is in dispute concerning whether plaintiffs have worked in excess of the statutory maximum number of hours permitted under the Fair Labor Standards Act, 29 U.S.C. Sections 201, et seq.

/S/ Frederick B. Lacey
FREDERICK B. LACEY
UNITED STATES DISTRICT JUDGE

DATE: November 15, 1982

F I L E D

NOV 16 1982
At 9:15 A.M.
ALLYN Z. LITE

ORDER DATED MAY 25, 1983

ORIGINAL FILED
MAY 25, 1983

ALLYN Z. LITE,
CLERK

HONORABLE DICKINSON
R. DEBEVOISE

UNITED STATES
DISTRICT COURT
DISTRICT OF NEW
JERSEY
CIVIL NO. 80-3307

VITTORIO MINEO, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

Civil Action

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendants.

ORDER

This matter having been opened to the Court on May 9, 1983 by Francis A. Mulhern, attorney for the defendant, The Port Authority of New York and New Jersey (Hugh H. Welsh appearing) for an Order amending the Court's order filed September 29, 1982 as amended, and the Curt having reviewed the pleadings and moving papers and having heard argument of counsel

It is Ordered that the Court's order dated September 29, 1982 as amended by order dated November 15, 1982 be further amended to add the following:

In the opinion of the Court, this Order involves a controlling question of law, whether the provisions of the Fair Labor Standards Act relating to wage and hour are applicable to the class of employees consisting of police detectives represented by the plaintiffs, and that an immediate appeal from the order will materially advance the ultimate termination of the litigation since a determination would finally resolve the legal issue relating to the applicability of the statute prior to the need for a lengthy proceeding establishing the damages, if any, due each member of the class

should the statute be found to have been violated.

The matter pending before the District Court is hereby stayed pending either a denial of an application for an appeal or a final determination of an appeal herein whichever is earlier.

DICKINSON R. DEBEVOISE

Dickinson R. Debevoise
U.S.D.J.

ORDER DATED JULY 7, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT #C-5

C.A. Misc. Record No. 83-8085
June 10, 1983

Vittorio Mineo, on behalf of himself and all other similarly situated

vs.

The Port Authority of New York & New Jersey, Petitioner

(NJ D.C. Civil 80-3307)

Present: GIBBONS and HUNTER,
Circuit Judges.

1. Application by petitioner for leave to take an Interlocutory Appeal,

in the above-entitled case.

Respectfully,

/S/ ARPI DERATZOUIAN

Deputy Clerk 7-5019

enc.
ad

---

Tne foregoing Motion is granted.

By the Court,

/S/ JOHN J. GIBBONS
Judge

Dated: July 7, 1983
ad/cc: Hugh H. Welsh, Esq.
Margulies, Margulies & Wind, Esqs.

**29 U.S.C., § 203. Definitions**

As used in this Act [29 USCS §§ 201-216, 217-219, 557]—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

• • •

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level, or

(IV) who is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office.

• • •

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

**§ 207. Maximum hours**

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

• • •

(k) No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

(1) in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the Fair Labor Standards Amendments of 1974) [29 USCS § 213 note] in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days,

compensation at a rate not less than one and one-half times the regular rate at which he is employed.

**Public Law 99-150**
**99th Congress**

Section 1. (a) SHORT TITLE.—This Act may be cited as the "Fair Labor Standards Amendments of 1985".

(b) REFERENCE TO ACT.—Whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be a reference to a section or other provision of the Fair Labor Standards Act of 1938.

SEC. 2. (a) COMPENSATORY TIME.—Section 7 (29 U.S.C. 207) is amended by adding at the end the following:

(o)(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

• • •

(c) LIABILITY AND DEFERRED PAYMENT.—(1) No State, political subdivision of a State, or interstate governmental agency shall be liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6 (in the case of a territory or possession of the United States), 7, or 11(c) (as it relates to section 7) of such Act occurring before April 15, 1986, with respect to any employee of the State, political subdivision, or agency who would not have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in sections 775.2 and 775.4 of title 29 of the Code of Federal Regulations.

• • •

SEC. 6. The amendments made by this Act shall take effect April 15, 1986. The Secretary of Labor shall before such date promulgate such regulations as may be required to implement such amendments.

SEC. 7. The amendments made by this Act shall not affect whether a public agency which is a State, political subdivision of a State, or an interstate governmental agency is liable under section 16 of the Fair Labor Standards Act of 1938 for a violation of section 6, 7, or 11 of such Act occurring before April 15, 1986, with respect to any employee of such public agency who would have been covered by such Act under the Secretary of Labor's special enforcement policy on January 1, 1985, and published in section 775.3 of title 29 of the Code of Federal Regulations.

**SIXTY—SEVENTH CONGRESS. SESS. 1 CHS. 76, 77. 1921.**

CHAP. 77.—Joint Resolution Granting consent of Congress to an agreement or compact entered into between the State of New York and the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York.

Whereas commissioners duly appointed on the part of the State of New York and commissioners duly appointed on the part of the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York, pursuant to chapter 154, Laws of New York, 1921, and chapter 151, Laws of New Jersey, 1921, have executed certain articles, which are contained in the following namely:

• • •

Whereas the said agreement has been signed and sealed by the commissioners of each State, and has thereby become binding on the two States as provided in the aforesaid acts: Therefore be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the consent of Congress is hereby given to the said agreement, and to each and every part and article thereof: *Provided,* That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement.

SEC. 2. That the right to alter, amend, or repeal this resolution is hereby expressly reserved.

Approved, August 23, 1921.

## CONSTITUTION OF THE UNITED STATES

### Art. 1, § 8. Powers of Congress

Section 8. The Congress shall have Power

• • •

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

### Art. 1, § 10.

• • •

No State shall, without the Consent of Congress, law any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## AMENDMENT [X.]

### Reserved powers to states

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.